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Declaratory Judgments with Recent Missouri Developments

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in articles 8 and 9 *of this chapter and the plaintiff therein suffer a non-suit* etc." R. S. Mo. 1929, §869 is one of the sections in Article 9 referred to R. S. Mo. 1929, §874. Thus, since the original action was not brought within the time allowed therefor in article 9, §874, had nothing to apply to, and hence any remarks concerning its effects are purely dicta.

There being no other deviations from the rule as declared by the Missouri Supreme Court in *Handlin v. Burchett* it stands as the law of Missouri today, the rule being that whenever, under the law of the place where the cause of action arose, further action thereon is barred, the same bar is a complete defense to any action thereon in the courts of Missouri.

J. H. HALEY '26.

DECLARATORY JUDGMENTS WITH RECENT MISSOURI DEVELOPMENTS

The Uniform Declaratory Judgment Act was enacted into law in Missouri on June 22, 1935,[1] thus becoming the sixth Uniform Act to be adopted in Missouri: the Negotiable Instruments Law, the Warehouse Receipts Act, the Reciprocal Transfer Act, the Veterans Guardianship Act, and the Federal Tax Lien Registration Act having been adopted previously. Four of the six acts have been adopted within the last six years. The widespread interest which has been manifested in the Declaratory Judgment Act by legal scholars and by state legislatures merits its discussion.

Historically, the underlying theory of declaratory actions dates back to the time of Moses.[2] From the Bible we learn that Zelophehad, a noble Israelite, died and left five daughters. Indignant over the possibility of having the property pass from the family's control because the father left no male heir to succeed to the heirloom, the daughters insisted upon claiming the right to inherit the estate. The petition was pointed! It simply put to the court the question, "Why should the name of our father be done away from among his family, because he hath no son?"[3]

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[1] Laws of Mo. 1935 p. 218. The wording of section 1 of the Missouri law has substituted the wording, "The Circuit Courts and the Courts of Common Pleas of this state, within their respective jurisdictions, etc." for the phrase, "Courts of record within, etc." contained in the Uniform Act. Sections 16 & 17 were omitted as being unnecessary and Section 15 was reworded to read, "All laws or parts of law in conflict with the provisions of this act are hereby repealed in so far as such laws are in conflict with provisions of this tct."

[2] Clark, And Zelophehad Had Daughters, 10 A. B. A. Journal 133 (1924).

[3] Numbers, 27: 4.

The prayer was granted and the law changed for all times. Moses sitting as chief justice declared:

> "And thou shalt speak unto the children of Israel, saying, if a man die, and have no son, then ye shall cause his inheritance to pass unto his daughters . . . and it shall be unto the children of Israel a statute of judgment."[4]

Since the judgment declared in the children a future interest in the Promised Land, it was purely declaratory in nature. When it came to the apportionment of the territory in the Promised Land, the petitioner's judgment was upheld; it was *res judicata.*[5]

The next example of a declaratory decree, in point of time, is that evidenced in the Roman Law. Under Roman procedure the *condemnatio* is analogous to our executory judgment. Where parties wanted, however, a preliminary decision they would refer their matter at issue to the *judex,* and his decision, which was no more than a declaration, was called a *prae-judicium,* containing no *condemnatio.* Another method illustrative of declaratory action was in the procedure adopted by the magistrates, who upon coming into office would cause to be published an edict, called a *perpetuum,* consisting chiefly of statements by the praetor of what he would do in certain instances. The essence of this procedure was the declaration of a remedy. All these pre-required decisions were given the force and effect of law, and the procedure became so useful in their jurisprudence that it was juxtaposed with the *ius civile,* arising from statute and interpretation. It became interwoven in the Roman law much like equity with the common law in the English legal system.[6]

Through the Middle Ages some forms of declaratory actions existed in most of the states of Central Europe. The present type of declaratory judgment acts seems to be patterned after the act adopted in Scotland some 400 years ago. The Scotch act was the vanguard in the development and even today stands foremost in the field of declaratory legislation.[8a]

Of the major commercial nations today England is the most enterprising in the field. In 1852 an act amending the rules of practice for the Chancery Court was adopted.[7] One of the newly enacted sections provided that no suit in the Chancellor's Court

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[4] Numbers, 27: 7, 8, 11.

[5] Joshua, 17: 3, 4.

[6] Jolowicz, *Historical Introduction to Roman Law,* pp. 95-97; Borchard, The Declaratory Judgment—A Needed Procedural Reform, 28 Yale L. J. 1.

[7] 15 & 16 Vict. c. 86, sec. 50.

[8] (1856) 2 K. & J. 753. The decision limited the application to cases in which some equitable relief might have been granted had the plaintiff desired to ask for it.

[8a] Infra, note 117.

should be open to objection merely because a declaratory order was asked, and that it should be lawful for the court to make a binding declaration of rights without granting consequential relief. The useful application of this act was prevented because of its strict construction in *Rooke v. Lord Kensington.*[8] This judicially imposed limitation prompted Parliament to pass an act which would dispose of these restrictions. With the passage of the Judicature Act of 1873 a complete innovation was effected. The pertinent section provided:[9]

> "No action or proceeding shall be open to objection, on the ground that a mere declaratory judgment is sought thereby, and the court may make binding declaration of rights whether any consequential relief is sought or could be claimed or not."

From the enactment of this act until the present day England has made wide use of the declaratory decrees. Its utility has there never been judicially questioned. It was accepted as a useful procedural reform. Experience has proved its worth. It has been weighed in the scales of English justice, and found not wanting.

In the United States the first attempt to obtain what some commentators think would today be properly a declaratory judgment, was made by the Secretary of State in 1793, when Jefferson inquired of the Supreme Court justices whether their advise would be available to the executive in the interpretation of statutes, treaties, etc. It was advanced that the problems presented were often not cognizable by the tribunals of the country. The answer of the court to President Washington was to the effect that the separation of the three departments of government furnished cogent argument against the practice of extra-judicially deciding the questions alluded to. The President was advised to depend upon the recommendations of the heads of the departments.[10]

The first state to pass a declaratory judgment act in the United States was Rhode Island which in 1876 passed an act permitting a very limited use of the declaratory judgment. The first more inclusive act was passed in 1915 by the state of New Jersey.[11] This act was followed four years later by the Michigan statute[12] which in substance was very similar to the act which in 1921 was given the approval of the National Conference of Commissioners on Uniform State Laws. The adoption of the act by

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[9] Rule 5, order 25. This provision although adopted in 1873 did not go into effect until 1883.

[10] Correspondence and Public Papers of John Jay, vol. 3, p. 486.

[11] New Jersey Laws 1915, p. 184.

[12] Public Acts 1919 (Mich.) act 150.

this body, furnished the momentum which has resulted in the acceptance of the Uniform Act in twenty-four states.[13] Thirteen other jurisdictions now have such statutes permitting declaratory actions differing in some small respect from the Uniform Act.[14] Three states have adopted the act this year.[15]

A movement to have a federal act passed permitting declaratory judgments in the federal courts was officially inaugurated on Jan. 7, 1919,[16] when such a bill was introduced in the United States Senate. Since that time at least one such bill was introduced at each session of Congress until the 73rd Congress finally passed the measure and it was sent to the President for his approval. On June 14, 1934, President Roosevelt penned his approval and the act became law.[17] During the fifteen year period the House of Representatives had acted favorably on three of the bills but each time the bills were left to perish in the Senate Judiciary Committee. The Federal Act is an abbreviated form of the Uniform Act but contains all the pertinent provisions.[18]

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[13] Alabama, Arizona, Colorado, Idaho, Indiana, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Utah, Vermont, Wisconsin, Wyoming, Puerto Rico.

[14] California, Connecticut, Florida, Hawaii, Kansas, Kentucky, Massachusetts, New Hampshire, New York, Philippines, Rhode Island, South Carolina, Virgina.

[15] Montana, Alabama, and Missouri all adopted the act within the first ten months of 1935.

[16] 65th Congress, S. 5304.

[17] Session Laws 73rd Congress, Second Session, chapter 512, pp. 955-958. The act was signed June 14, 1934. It provides; "Sec. 274D (Judicial Code). (1) In cases of actual controversy the courts of the United States shall have power, upon petition, declaration, complaint, or other appropriate pleading to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

"(2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith.

"(3) When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not."

By an amendment of August 30, 1935 the relief was denied as to Federal taxes. The act as amended by sec. 405 of the Revenue Act of 1935 now reads, "(1) In cases of actual controversy (except with respect to Federal Taxes) the courts, etc." It was also provided that the limitation was to be imposed on all suits then pending as well as to future suits.

[18] A conclusive discussion of the separate provisions of the Uniform Act is contained in an article by Edwin Borchard, *Declaratory Judgments*

CHARACTERISTICS OF THE DECLARATORY JUDGMENTS

A. *No Executory Award*

In the absence of statutes permitting declaratory judgments the courts will not render declaratory decrees.[19] What then is the chief characteristic of the declaratory judgment that has prompted the courts to refuse such relief? The important feature is that it orders nothing to be done, but stops with the "declaration." While the courts have seized upon this unique (so some courts have said) feature as a basis for denying this type of relief, one of the most eminent authorities on procedure [20] has expressed the belief that this fact alone does not justify the courts in regarding the declaratory judgment as an extra-ordinary remedy. The first specific expression that the "award of execution is an essential part of every judgment passed by a court, exercising judicial power" was in the case of *Gordon v. United States*.[21] The fallacy of this contention was apparently recognized by the court in 1927 in *Fidelity Bank and Trust Co. v. Swope*[22] where it was held that the award of execution was *not* an essential adjunct of the judicial power. This view has twice been reiterated by the Supreme Court.[23] Whereas, it is to be admitted that the command of the court is an incident to the effectiveness of a judgment, it is the *determination* of the legal rights that renders the matter *res judicata*. An analysis of the function of a judgment, whether in rem or in personam, reveals that very often its purpose is merely to determine, declare, and establish the existence or non-existence of a legal relationship.[24] The conclusion that the primary function of a judgment is not for the redress of a wrong, but often to declare, preserve and protect a right is further fortified by the statutory language

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(1934) l. c. 74-91. For the discussion of the provisions of the Federal Act see Borchard, The Federal Declaratory Judgment Act, 21 Va. L. R. 35, l. c., 43-48.

[19] United States v. Northern Pac. R. Co. (1927) 18 F (2d) 299; Nelson v. Burns (1930) 255 Ill. App. 314; State ex rel. Patton v. Terpstra (1928) 206 Iowa 418, 220 N. W. 357; White v. Franklin (1932) 165 Miss. 729, 140 So. 876; Ex parte Steele (1908) 162 Fed. 694; Snell v. Welch (1903) 28 Mont. 482, 72 Pac. 988; Hanson v. Griswold (1915) 221 Mass. 228, 108 N. E. 1035; 33 C. J. 1097, sec. 57, and cases cited.

[20] Clark, Code Pleading (1928) p. 234 sec. 53.

[21] (1865) 117 U. S. 697. Prior reference to this point was made in Hayburn's Case (1792) 2 Dall. 409; United States v. Ferreira (1851) 13 How. 40.

[22] (1927) 274 U. S. 123.

[23] Old Colony Trust Co. v. Commissioners (1929) 279 U. S. 716; Nashville, etc. R. R. Co. v. Wallace, infra note 81.

[24] Phillips, Code Pleading (2nd ed. 1932) chap. 11; Pomeroy, Code Remedies (4th ed. 1904) sec. 347. See also Sheldon v. Powell (1930) 99 Fla. 782, 128 So. 258. This fact is perhaps most evident in annulment decrees.

employed in the acts which abolish the distinction between legal and equitable actions. The usual phrasing used is, 'There shall be in this state but one form of action for the *enforcement* or *protection* of private rights. . . ."[25]

Historically the courts were established for the purpose of peaceably redressing wrongs in lieu of the then prevalent remedy of self help. Courts of equity have, however, for centuries recognized the practical inadequacy of purely remedial relief and, under the guise of some legal caption, have rendered many decrees which are essentially declaratory in nature. Bills for the cancellation of instruments and reformation of contracts, suits to quiet title and to remove clouds, decrees of annulment, bills *quia timet* and interpleader, and bills for the perpetuation of testimony are notable examples of suits which are primarily concerned with preventing future injury rather than compensation for a past wrong.[26] The extension of these well known equity principles into the declaratory judgment field will permit adjudication heretofore impossible. For example, it is easy to imagine a situation where one's right is not actually invaded, but merely placed in jeopardy, or at least in doubt, by some unforeseen event.[27] The only thing evident is that the plaintiff is troubled because of the uncertainty of his legal relation. The courts by removing the uncertainty, will at the same time confirm or deny one's existing rights. By so acting the courts are performing their most useful purpose; for by it they are establishing a security in jural relations which is the Gibraltar of social progress and economic stability. In so far as the declaratory action will serve to remove the cloud from legal relations, it is merely an extension, and a worthy one, of the bill *quia timet*, viz., although no wrong has been committed which would form a legal action and none so immediately threatened as to afford a basis for injunctive relief against its commission yet the mere existence of the controversy has immediate harmful consequences.[28] It is elementary that such a procedure will permit the bringing of

[25] R. S. Mo. 1929 sec. 696.

[26] Bills *quia timet*—a writ of prevention designed to avoid possible future injury to one's property. In this same nature are bills for the cancellation of instruments and injunctions to prevent waste.
Bills of peace—a bill designed to establish and to perpetuate a right which may be controverted by many persons.
Actions to perpetuate testimony—designed to preserve for future use testimony which is in danger of being lost. In England it has been judicially declared that such a bill is unnecessary where an action for a declaratory judgment would suffice to declare the litigant's respective rights. West v. Lord Sackville (1903) 2 Ch. 378.

[27] For a collection of cases on this point see Borchard, *Declaratory Judgments*, l. c. 25.

[28] State ex rel. Hopkins v. Grove (1921) 109 Kans. 619, 201 Pac. 82.

legal issues before courts forjudicial determination before hostile action has caused excessive—and ofttimes irreparable—injury. Its "nip in the bud" characteristic will prevent neighbors from becoming bitter enemies and will enable business associates to remain friends.

Whereas the declaratory decree does not require that consequential relief be awarded, the judgment may be made the basis for such relief, if necessary, in a subsequent action. In this respect, it differs in no way from those equitable proceedings where the enforcement of the orders is obtained only on a subsequent order in contempt or otherwise. The rule that all courts have inherent power to enforce their decress, and to make such orders as may be necessary to render them effective[29] is not at all abridged because the judgment happens to be declaratory in nature. The declaratory judgment is not an imposition upon the courts of a new device: it is merely the extension of the well established judicial function of declaring the law which governs a given condition of facts so as to make the factual controversy *res judicata.*[30] It is an innovation only in so far as it relieves litigants of the requirement that there be an actual violation of a right before the courts be called upon to adjudicate the differences.[31]

B. *Only Applicable to Actual Controversies*

One fond contention of the opponents of this newly enacted procedure is that it requires the court to give advisory opinions and adjudicate "moot" cases. The claim is unfounded. No decision can be found in which a court decided a "moot" case under a declaratory judgment statute. The distinction between a moot case, and advisory opinion, on the one hand, and a declaratory judgment on the other hand is well recognized in the case law.[32] The expression "advisory opinion" dates back to the early periods of English history and connotes the practice of extra-judicial consultation of the Judges by the Crown and the House of Lords.[33] It is but an expression of opinion on facts not necessarily in dispute, and is generally an *ex parte* proceeding which has no binding effect on future litigation. A "moot" case is

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[29] 34 C. J. 737.

[30] Petition of Kariher (1925) 284 Pa. 455, 131 Atl. 265.

[31] De Charette v. St. Matthews Bank & Trust Co. (1926) 214 Ky. 400, 283 S. W. 410; American Nat'l. Bank and Trust Co. v. Kushner (1934) 174 S. E. 777.

[32] See dissenting opinion by Sharpe, J., in Anway v. Grand Rapids Ry. (1920) 211 Mich. 592, 179 N. W. 350. See also Adams v. R. R. (1899) 21 R. I. 134, 43 Atl. 515; Miller v. Miller (1924) 149 Tenn. 463, 261 S. W. 965; Douglas Oil Co. v. State (1935 Tex. Civ. App.) 81 S. W. (2d) 1064; Petition of Kariher, supra.

[33] Douglas Oil Co. v. State (1935 Tex. Civ. App.) 81 S. W. (2d) 1064.

imaginary and the decision is mere dictum. The declaratory judgment, on the other hand, differs *toto coelo* from either of the two. The declaratory judgment deals only with a real factual issue, and the decision is *res judicata.* This makes it clear that the rule against the advisory opinions and "moot" cases does not justify its being moulded into a barrier against declaratory proceedings,[34] which applies only to "actual controversies."

The "actual controversy" requirement has an interesting history. After the Michigan court declared the declaratory judgment act of that state invalid,[35] on the basis that no actual controversy was presented the state of Kansas, in an effort to guard against the misapplication of the function of the declaratory judgment, expressly provided as a prerequisite to the institution of the proceeding that an "actual controversy" exist.[36] The inclusion of this provision will in no way increase the utility of the act, but will afford a basis to those jurists who are hostile to the proceedings, to say that a controversy concerning legal rights arising before damage is inflicted, or at least seriously threatened, is not "actual" and thereby justify their refusal to adjudicate the issue.[37] It follows from the very nature of the act that as a prerequisite to the action a bona fide controversy between parties must exist. The cases are legion in the expression of this requirement even in the absence of the expressed "actual controversy" provision.[38] Courts differ as the day is long as to what constitutes a controversy, but none deny its necessity as a condition precedent to the maintenance of the action. In *Liberty Warehouse Co. v. Grannis*[39] the fact that the statute at issue was not being forcibly imposed upon the petitioner was considered controlling in the determination that no controversy over which

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[34] Ellingswood, Constitutionality of Declaratory Judgments, 28 Ill. L. R. 74, l. c., 88.

[35] Anway v. Grand Rapids Ry. Co. (1920) 211 Mich. 592, 179 N. W. 350.

[36] The Federal Declaratory Judgment Act contains a similar provision. So does the acts of California, Kentucky, Virginia, and Hawaii.

[37] Supra, note 18, at page 35.

[38] Holt v. Custer County (1926) 75 Mont. 328, 243 Pac. 811; Petition of Kariher, supra; Revis v. Daugherty (1926) 215 Ky. 823, 287 S. W. 28; Tanner v. Boyton Lumber Co. (1925) 98 N. J. Eq. 85, 129 Atl. 617; Miller v. Miller (1923) 149 Tenn. 463, 261 S. W. 965; Garden City News v. Hurst (1929) 129 Kan. 365, 282 Pac. 720; Hagan v. Dungannon Lumber Co. (1926) 145 Va. 568, 134 S. E. 570; Dietz v. Zimmer (1929) 231 Ky. 546, 21 S. W. (2d) 999; Cummings v. Shipp (1928) 156 Tenn. 595, 3 S. W. (2d) 1062; Insurance Co. v. Cochrane, infra, Dobson v. Ocean Acci. & G. Corp. (1933) 124 Neb. 652, 247 N. W. 789; Shepard v. Hauser (1935) 138 Cal. App. 384, 32 P (2d) 149; Board of Education v. Borgen (1935) 192 Minn. 512, 257 N. W. 92. A mere difference of opinion is not an actual controversy. Jefferson County ex rel. Coleman v. Chilton (1930) 236 Ky. 614, 33 S. W. (2d) 601.

[39] (1927) 273 U. S. 70.

the court could take jurisdiction was established, yet in another case[40] the court was of the opinion that the mere existence of a statute, whether or not an attempt was made to enforce it against the plaintiff, constitutes an invasion of his rights, justifying a resort to the court for a declaration. Actions by taxpayers against tax collectors to have declared the validty of a taxing statute have been held to establish a justiciable controversy.[41] The more desirable rule has recently been expressed in the case of *Sage-Allen Co. v. Wheeler*[42] where the court declared that any person who would be subject to regulation by an act might apply for a declaratory judgment to determine the validity of the regulation. In other words, the courts will, it appears, no longer search behind the pleadings to ascertain whether there is an "actual" controversy. In one of the first federal cases to be adjudicated under Federal Declaratory Judgment Act[43] it was held that there was an "actual controversy" in that the defendant by contesting the suit, indicated that he intended to take issue with the claims of the plaintiff.

It is difficult to find a common denominator that will bring the decisions into harmony. Mr. Justice Hall, in *Miller v. Miller*[44] attempted to lay down a standard when he said:

> ". . . The only controversy necessary to invoke the action of the court and have it to declare rights under our declaratory judgment statute is that the question must be real, and not theoretical; the person raising it must have a real interest and there must be someone having a real interest to oppose the declaration sought. It is not necessary that any breach should be first committed, any right invaded, or wrong done . . ."

Perhaps it would be desirable to drop the requirement of an "actual controversy" and permit the plaintiff to force a controversy, as has been recommended.[45] It seems immaterial for the line of demarcation between cases of actual theoretical controversies cannot be controlled effectively by express provisions. Rather, the determination will depend solely upon the function of judicial inclusion and exclusion.[46] One limitation, however,

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[40] Village of Euclid v. Ambler Realty Co. (1926) 272 U. S. 365; City v. Milliken (1925) 257 Ky. 245, 77 S. W. (2d) 777.

[41] Moeller, McPherrin & Judd v. Smith (1934) 127 Neb. 424, 255 N. W. 551; State ex rel. Tele. Co. v. Henry (1935) — Wis. ——, 260 N. W. 486.

[42] (1935) — Conn. —, 179 Atl. 195.

[43] Black v. Little (1934) 8 F. Supp. 867.

[44] (1923) 149 Tenn. 463, 261 S. W. 965.

[45] Schroth, The Actual Controversy In Declaratory Actions. 20 Cornell L. Q. 1.

[46] Supra, note 34.

can be stated with a good deal of positiveness. The courts are almost unanimous in holding that they will not render declaratory relief on facts that have not accrued. It is not considered sufficient that the danger is contingent on the occurrence of some future event or events.[47] To illustrate: the courts have refused to determine who will be entitled to a fund prior to the time for its distribution,[48] it has refused to declare who will have the burden of proof in the event an action is brought, and whether it will be barred by the Statute of Limitations;[49] and it has likewise declined to adjudicate the validity of a city ordinance which was merely being considered by the city assembly.[50] The reason underlying the hesitancy of the courts in adjudicating issues dependent upon future contingencies appears to be that the courts are unable accurately to anticipate the facts that will become operative to effect other and different persons.

C. *Miscellaneous Requirements*

The statement is generally made that declaratory relief is discretionary.[51] This statement has often proved misleading. The extent of the discretion is rather that which is permitted within the wording of the act. The restriction imposed by section 6 states:

> "The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding."

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[47] Hodges v. Hamblin Co. (1925) 152 Tenn. 395, 277 S. W. 901; In re Gooding (1925) 208 N. Y. Supp. 793; Reese v. Adamson (1929) 297 Pa. 13, 146 Atl. 262; Van Roy v. Hoover (1928) 96 Fla. 194, 117 So. 887; Black v. Coal Corp. (1930) 233 Ky. 588, 26 S. W. (2d) 481; Villani v. National City Bank (1932) 256 N. Y. Supp. 602; Sigal v. Wise (1932) 114 Conn. 297, 158 Atl. 891; Milwaukee, etc. R. Co. v. City of South Milwaukee (1935) 260 N. W. 631; In re Grotenrath's Estate (1934) 215 Wis. 381, 254 N. W. 631.

[48] Morril v. Roberts (1918) 117 Me. 465, 104 Atl. 818.

[49] Oldham County v. Arvin (1932) 244 Ky. 551, 51 S. W. (2d) 657. In fact declaratory actions cannot be invoked for the determination of procedural rules or declaration of substantive rights involved in a pending suit. Lumber Co. v. Knuckles (1934) 253 Ky. 292, 69 S. W. (2d) 345. For a discussion of circumstances where it is necessary to determine rights which will arise in the future see comment 20 St. L. L. R. 278.

[50] Denver v. Denver Land Co. (1929) 85 Colo. 198, 274 Pac. 743.

[51] Columbia University v. New York (1929) 235 N. Y. Supp. 4, Barcham v. Rochester (1927) 246 N. Y. 140, 158 N. E. 51; Transport Oil Co. v. Bush (1931) 114 Cal. App. 152, 1 P (2d) 1060; A. Hamburger & Sons v. Rice (1933) 18 P (2d) 115; Kallikau v. Hall (1923) 27 Hawaii 420; James v. Alderton (1931) 256 N. Y. 298, 176 N. E. 401; Colson v. Pilgram (1932) 259 N. Y. 370, 182 N. E. 19; Ackerman v. Union (1917) 91 Conn. 500, 100 Atl. 22; Amer. B. & T. Co. v. Kushner (1934 Va.) 174 S. E. 777. Bell Telephone Co. v. Lewis (1934) 313 Pa. 374, 169 Atl. 571; Automotive

The criterion then, is whether or not a useful purpose will be served by rendering the declaration.[52] Although the criterion of "useful purpose" is too general to afford a definite guide in practice it has moulded itself into a standard. That courts should not be too astute to refuse the declaratory remedy is further evidenced by the provisions of section 12 of the Uniform Act which recites that the act is to be liberally construed and administered. This section of the act has received express judicial approval.[53] So while the courts will continue to reiterate the rule that the relief is discretionary, where the requirements are present it is both the right and the duty of the court to take jurisdiction and render declaratory relief.[54]

As a general rule declaratory relief has been denied in instances where *all* the parties in interest were not made parties to the suit.[55] In so far as the basis for this holding is that to declare the rights of some persons would not accomplish the desired purpose because the parties whose rights were not declared would not be bound by the decision there is no reason to quarrel with the rule. Courts have, however, often overlooked the reason for the rule and have acted arbitrarily in dismissing actions were all the parties interested were not joined, though the rights of the non-joined parties were immaterial and problematic. Nor is the rule as it is often judically applied, justified by the word-

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Equipment v. Trico Products (1935) 11 F. Supp. 292; Baumert Dairy Products v. Borden Co. (1935) 281 N. Y. Supp. 423.

[52] Somberg v. Somberg (1933) 263 N. Y. 1, 188 N. E. 137; Taylor v. Haverford Twp. (1930) 299 Pa. 402, 149 Atl. 639. But a court must not act arbitrarily, and when relief is refused reasons for the refusal must be made part of the court record and may be made the basis for an appeal. Northwestern Nat'l. Life Ins. Co. v. Freedy (1930) 201 Wis. 51, 227 N. W. 952; Colson v. Pilgrim (1932) 259 N. Y. 370, 182 N. E. 19.

[53] Carolina P. & L. Co. v. Iseley (1933) 203 N. C. 811, 167 S. E. 56.

[54] Wingate v. Flynn (1931) 249 N. Y. Supp. 351. It is noteworthy that courts have expressed the view that declaratory decrees will not be rendered on cases presented on an agreed set of facts. Williams v. Powell (1894) W. N. 141. But there appears to be no U. S. case on this problem.

[55] Continental Mutual Ins. Co. v. Cochrane (1931) 89 Colo. 462, 4 P. (2d) 308. Here the Insurance Co. sued the Insurance commissioner of Colorado seeking to obtain the declaratory judgment determining an alleged controversy between the said parties arising out of conflicting interpretations put upon certain provisions of the company's charter membership policies. The court refused to declare the rights because the policyholders of these charter policies were not made parties, although their interests would be vitally affected by the decree. In Hall v. U. S. Nat'l. Bank of Omaha (1935) 128 Neb. 254, 258 N. W. 403, it was held that the state treasurer could not maintain declaratory judgment actions against state depository banks, which refused to honor checks drawn by him, because of doubt existing as to his official status, to determine his status under his bond, since the state and the surety on the bond were not joined. See also Updike Inv. Co. v. Assurance Co. (1935) 128 Neb. 295, 258 N. W. 470; Wright v. McGee (1934) 206 N. C. 52, 173 S. E. 31.

ing of the act. Section 11 of the Uniform Act which recites the necessity of joining all persons who have an interest in the issue, does not render it mandatory that every interested person be made a party, for the section further provides that if certain persons are not made parties, the court may still issue the decree, which will not prejudice the rights of persons not parties.

Historically, where there was an adequate remedy at law an action in equity was dismissed. That problem is now present in this analogous procedure. The problem in equity was dispensed with in a liberal manner. The present rule is to the effect that it is not enough to dismiss the action, that there is a remedy at law; it must be plain and adequate; as practical and efficient to the ends of justice and its prompt administration as the equitable remedy.[56] Such a solution would be desirable under this new procedure. The bare fact that there is another remedy available should not be made the basis for the refusal of the declaratory relief, per se. Admittedly, this contention has received little judicial support, with the courts generally holding that where another remedy is provided by statute, the court will refuse declaratory relief.[57] Often a distinction is made when the other remedy is statutory or one at common law. The cases so holding take the view that when the other remedy is a common law remedy declaratory relief may be decreed, whereas, when the other remedy is statutory then declaratory relief is precluded.[58] The contention that where there is a specific statutory remedy for a case provided, a declaratory judgment will not be rendered is really a contradiction of that portion of the Act that says, "whether or not further relief is or could be claimed." There is no historical precedent for the supposition that the declaratory judgment is like an extraordinary remedy and to be employed only where no other regular action is available for since the inception of modern declaratory actions it has existed co-ordinately with prayers for coercive relief (which must be pleaded

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[56] Boyce v. Grundy (1830) 2 Pet. (U. S.) 210.

[57] Bell Telephone Co. v. Lewis (1934) 313 Pa. 374, 169 Atl. 571; Reynolds v. Chase (1935 N. H.) 177 Atl. 291; Petition of Kariher, supra; Shearer v. Backer (1925) 207 Ky. 455, 269 S. W. 543; Baird v. Wyandotte County (1924) 117 Kan. 151, 230 Pac. 531; Kaleilau v. Hall (1923) 27 Hawaii 420; Jefferson ex rel. Coleman v. Chilton, supra; Shores v. Ayres (1931) 254 Mich. 58, 235 N. W. 829; Slowmach Realty Corp. v. Leopold (1932) 258 N. Y. Supp. 500; McCalmont v. McCalmont (1928) 93 Pa. Super. Ct. 203. In many of the cases the ruling was unfortunate dicta, since all that was necessary to be said to decide the issue was that the court did not have jurisdiction over the subject matter originally, and that the declaratory judgment acts do not extend its powers over matters which are beyond its judicial power.

[58] Hoel v. Kansas City (1930) 131 Kan. 290, 291 Pac. 780.

in a separate count).[59] In fact, declaratory judgments may be had where coercive relief is also sought, where such relief could be had but was not asked for because the plaintiff was satisfied with a milder remedy, and where, because no damage had yet been inflicted or dangerously threatened, coercive relief could not be obtained.[60]

CONSTITUTIONALITY

A. *In The State Courts*

In no foreign country has the Declaratory Judgment Act been challenged on a constitutional basis. In this country the attack has been predicted upon the political theory of the separation of powers, and the issue is dependent on a determination of what is judical power. Do declaratory actions fall within the "case and controversy" requirement?

The first state case to adjudicate the constitutionality of the Declaratory Judgment Act was the case of *Anway v. Grand Rapids Ry. Co.*[61] A Michigan statute prohibited railway employees from working more than six days a week. The plaintiff, a non-union conductor, wishing, so he alleged, to work more than the six days, brought a suit under the state Declaratory Judgment statute, in which his employer was made a defendant, asking that the court *declare* that he could work more than the limited number of days prescribed by the statute. The railway employees' union intervened and contended that the statute should be construed as preventing the plaintiff from working more than six days. The employer-defendant answered; not claiming, however, that any right was invaded or threatened of invasion. The Supreme Court, in reversing the verdict for the plaintiff and dismissing the action, held that no controversy existed, and then went on to state that the Declaratory Judgment Statute was unconstitutional. The majority of the court gave as their reason for this holding that the statute imposed "non-judicial" functions on the court, because the power to make a binding declaration of rights where no consequential relief can be had is not a judicial power, and cannot be conferred on the courts. It is quite evident from a close examination of the majority opinion, that they confused the declaratory judgment with advisory opinions and moot cases: for throughout the opinion cases which are truly moot and advisory are cited as authoritative.[62] The writer has been un-

[59] Brix v. People's Mutual Life Ins. Co. (1934) — Calif. —, 37 P (2d) 448; Lowe v. Lowe (1934) 265 N. Y. 197, 192 N. E. 291; Gold v. Gold, (1934) 275 N. Y. Supp. 507.

[60] Supra, note 59.

[61] (1920) 211 Mich. 592, 179 N. W. 350, 12 A. L. R. 26.

[62] The dissenting opinion by Sharpe, J., was precise in pointing out the misconception of the majority opinion on this matter.

able to find any comments praising the decision. Some of the commentators feel that the court was essentially right in holding that there was no "actual controversy," since the adverse party to the issue was not the employer-defendant but the employees' union who intervened and who were outside the jurisdiction of the court.[63] Others take the view that the court had no just reason to search behind the pleading and examine the situation.[64] It does seem that the defendant in the instant case had as much of an adverse interest as do corporations in a suit by a stockholder brought to enjoin them from paying a tax imposed.

As to the theory of the Michigan court that an occasion to issue final process is a prerequisite to the exercise of the judicial power, the court was surely in error.[65] And regardless of whether the court took jurisdiction over a case which the Act did not intend it to, the effect of the decision was damaging, in that it placed a temporary impediment in the path of declaratory actions.

In the next important state decision we find a Kansas court more enterprising. The case of *State ex rel Hopkins v. Grove*[66] was one brought to have declared the rights of an elected officer under a certain statute. The Kansas act contained the express requirement of an "actual controversy."[67] This provision the court held enabled them to distinguish this case from the *Anway* case, which, however, was disapproved, while the dissenting opinion of Sharpe, J., was accepted. The *Grove* case having decided that the declaratory judgment procedure, besides being an expedient method of obtaining an adjudication without requiring damage as a condition precedent, was not repugnant to the judicial power as confined by the Constitution, became the accepted guide by other jurisdictions which were called upon to adjudicate upon the validity of the Declaratory Judgment Statutes.

In 1924 the Tennessee court in *Miller v. Miller*[68] announced a decision in which the Uniform Act was declared constitutional. In declaring the plaintiff's rights under the disputed will the court stated that it was of the opinion that it was within the province of the judiciary to adjudicate upon, and protect, rights of citizens and to apply the laws in pursuance therewith. No

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[63] See comments in 4 Ill. L. Q. 126; 30 Yale L. J. 161; 5 Minn. L. R. 172, 21 Col. L. R. 168.

[64] See comment in 19 Mich. L.R. 86; 7 Cornell L. Q. 255.

[65] See discussion by note 21, supra. Also see Gray, *Nature and Sources of the Law* (2d ed. 1921) 115; Cooley, *Constitutional Limitations* (7th ed. 1903) 132; 30 Yale L. J. 163, 164.

[66] (1921) 109 Kans. 619, 201 Pac. 82.

[67] See discussion by note 36.

[68] Miller v. Miller (1924) 149 Tenn. 463, 261 S. W. 965.

jurisdiction has declared the Uniform Act invalid. In some states the courts have not been called upon to decide the issue as yet: in all those where the issue has been presented for judicial determination it has been declared constitutional.[69] It is most notable that ten years after the *Anway* case the Michigan court reversed itself in the case of *Washington Detroit Theatre Co. v. Moore,*[70] where the constitutionality of the act was upheld.

B. *U. S. Supreme Court Cases Before the Federal Act*

Since the "case and controversy" provision of Article III of the Federal Constitution has been judicially interpreted in *Marbury v. Madison*[71] it has remained substantially unchanged. The courts are firm in their holding that Congress cannot confer upon them jurisdiction over any causes which are not "cases or controversies."

It is often claimed that the Supreme Court's hostility to what we now term declaratory judgments is found in the case of *Muskrat v. United States.*[72] The suit was brought by the Cherokee Indians as authorized by an act of Congress. The act was later repealed and the petitioners contended that the repeal was unconstitutional. The Supreme Court took the position that it was without jurisdiction over the cause and remanded the case to the Court of Claims with instructions to dismiss the case. Although the court did say that there was no "case" presented since the purpose of the action was to determine the doubtful character of the legislation, a careful analysis of the decision will reveal that it is not a precedent for the holding that the courts will not entertain declaratory actions, for in fact, the interests of the government-defendant would in no way be affected by the decision, whatsoever it might have been. But the case *was* considered to have laid down that very proposition, and was relied on by the Michigan court in the *Anway* case. It is the implication and not the actual holding, that is to be regretted.

The next important Supreme Court decision on the topic was that rendered in the case of *Liberty Warehouse Co. v. Grannis.*[73]

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[69] Some of the more important decisions are: *Arizona:* Morton v. Pacific Construction Co. (1929) 36 Ariz. 97, 283 Pac. 281; *California:* Blakeslee v. Wilson (1923) 190 Cal. 479, 213 Pac. 495; *Connecticut:* Braman v. Babcock (1923) 98 Conn. 549, 120 Atl. 150; *Florida:* Sheldon v. Powell (1930) 99 Fla. 782, 128 So. 258; *Kansas:* State ex rel. Hopkins v. Grove, supra; *Michigan:* Washington Detroit Theatre Co. v. Moore (1930) 249 Mich. 673, 229 N. W. 618; *New York:* Board of Education v. Van Zandt (1923) 234 N. Y. 644, 138 N. E. 481; *Pennsylvania:* Petition of Kariher (1925) supra; *Tennessee:* Miller v. Miller, supra. For a complete list of cases see Borchard, *Declaratory Judgments,* p. 635 et seq.

[70] (1930) 249 Mich. 673, 229 N. W. 618, 68 A. L. R. 105.

[71] (1803) 1 Cranch 137.

[72] (1911) 219 U. S. 346. Opinion delivered by Mr. Justice Day.

[73] (1927) 273 U. S. 70.

The case originally was brought under the Kentucky Declaratory Judgment Act and sought the determination of the validity of a statute which proported to regulate the sale of tobacco at public auction. The verdict for the defendant was appealed to the Supreme Court, which refused to review the merits of the decision on the basis that no "case or Controversy" was presented over which the court could properly take jurisdiction. The court felt justified in so declaring since there was no allegations that the plaintiff intended to violate the act, or that the defendant had threatened to prosecute them for violation. This decision was closely followed by the case of *Liberty Warehouse Co. v. Burley Tobacco Growers' Ass'n.*[74] Here the court in refusing to review the decision for the defendant, declared that they had no jurisdiction to review mere declaratory judgments. The decisions seem to indicate that injury *must* be a condition precedent to a resort to the judicial power. A search of the law reviews show that the *Liberty Warehouse Co.* cases were accepted as deserving of great stricture.[75]

In the same year another important decision was rendered in the case of *Willing v. Chicago Auditorium.*[76] The corporation was desirous of rebuilding the premises maintained upon the grounds of the lessor, and being skeptical as to their right to do so, because of the lease, brought suit to remove the cloud formed by the provisions in question. It is of importance to note that the petitioners did not ask for declaratory relief, but only that the cloud be removed. On appeal to the Supreme Court the opinion of the court was rendered by Mr. Justice Brandeis. The court admitted that the case was not a "moot" one; that a final judgment could be given; that the interests of the parties were definite and certain; that there was no attempt to secure an abstract determination by the court of the validity of the statute;[77] but the court felt that no "case" within the meaning of Article III was presented since the plaintiffs fears were thwarted by his own doubts. All that it was necessary to say to decide the case was that there was no cloud which could be removed. But Mr. Justice Brandeis preferred another approach. He said in substance, that all that the plaintiff wanted was a declaratory judgment, and that it was beyond the jurisdiction of the court to review a mere declaratory decree. The court was content to say that such a friendly proceeding was unknown at the time of the adoption of the Constitution. Once again, it was not the

[74] (1928) 276 U. S. 71.
[75] See 100 Cent. L. J. 95; 40 Harvard L. R. 903; 25 Mich. L. R. 529; 36 Yale L. R. 845.
[76] (1928) 277 U. S. 274.
[77] l. c., p. 289.

actual decision that "hurt" but the syllogistic generalization that it uttered. The decision seems to reason as follows: the suit is a friendly suit over which the courts have no jurisdiction; it is a suit for a declaratory judgment; therefore, all declaratory judgment suits involve a friendly suit. The only encouragement given by the *Willing* case to the proponents of the act is the dictum uttered by Mr. Justice Stone in a concurring opinion. He says, "I am not prepared . . . to say anything in support of the view that Congress may not constitutionally confer on the federal courts jurisdiction to render declaratory judgments. . . ."

Within a comparatively short time the court again took occasion to denounce declaratory relief as being beyond the limits of the judicial power, but no specific discussion of its unconstitutionality was engaged in either *Piedmont & Northern Ry. Co. v. United States*[78] or in *Arizona v. California.*[79]

It is evident from a perusal of the five decisions that the chief obstacle to the validity of such judgments centered in the belief that they did not fit the legal concept of justiciable controversies.[80]

In 1933 the Supreme Court seems to have completely reversed its previous holdings. Mr. Justice Stone rendered the opinion in *Nashville, Chattanooga & St. Louis Ry. v. Wallace,*[81] a case brought by the railroad under the Declaratory Judgment Act of Tennessee to secure a judicial declaration that a state statute imposing a tax on the storage of gasoline was, as to them, invalid. A verdict for defendant was appealed to the Supreme Court, and in an unanimous decision the decision for defendant was affirmed, but at the same time it was stated that the Supreme Court *would* review actions brought under the declaratory procedure. In view of the past cases the pronouncement of the court was extraordinary. The court held that if a question presented was justiciable if presented in a suit for injunction, it was no less so because the appellants were permitted to present the case through a modified procedure under which they were not required to make a prayer for an executory award, or to allege irreparable damages. Another passage in the decision that commands our attention, is that which says, "While the ordinary course of judicial procedure results in a judgment requiring an award of process or execution to carry it into effect, such relief *is not an indispensable adjunct* to the exercise of the judicial function." (Italics own.)[82]

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[78] (1930) 280 U. S. 469.
[79] (1931) 283 U. S. 423.
[80] Comment by "S. M. R." in 18 St. Louis L. R. 261 (1933).
[81] (1933) 288 U. S. 249, 77 L. Ed. 730, 87 A. L. R. 1191.
[82] See discussion by note 23, supra.

While the *Wallace* case decides that the Supreme Court will not refuse to entertain jurisdiction over causes instituted under *state* declaratory judgment acts, query, whether it is a clue to the validity of the Federal Declaratory Judgment Act. Since the case preceded the enactment of the Federal statute it contains no reference to the act, therefore, we must search various passages for clues and speculate upon the final outcome.

The court's attitude to this newer procedure seems to be expressed in the following passage:

> "The judiciary clause of the Constitution defined and limited judicial power, not the particular method by which that power might be envoked. It did not crystallize into changeless form the procedure of 1789 as the only possible means for presenting a case or controversy otherwise cognizable by the federal courts."

It is not to be overlooked that the *Wallace* case did not expressly overrule the previous cases, rather it distinguished them from the instant case. In so far as the court entered upon these distinctions there is some justification for the belief that the *Wallace* case merely decided that jurisdiction would be maintained over the particular case, and that it did not announce a principle of law by which they will be guided in the future. On the other hand there is basis for the belief that the decision is more far reaching. The language used in the decision leads to the conclusion that the Court has made an "about face" on the question of reviewing declaratory judgments. If this is so would it not be incongruous for the Supreme Court to take appellate jurisdiction over causes arising under Declaratory Judgment Statutes in the states, and to shut the door to original petitions based on the same procedure? Up to the time of this writing the Court has not had occasion to express its view as to the constitutionality of the Federal Act. Only once has it had occasion to mention—but not adjudicate upon—the act.[83]

The *Wallace* case is the first case in which the nature of the declaratory judgment was fully investigated. In that case no other relief was possible, and the conclusion reached is a definite precedent. In the prior cases the court went out of its way to denounce the declaratory actions (since in each case the same result would have been arrived at without any reference to the nature of the proceeding). It was this very fact that led legal

[83] United States v. West Virginia (1935) Sup. Ct. 789. Here the government made no attempt to sustain the bill in equity under the Declaratory Judgment Act but the court made mention of the fact that even if it had it would have made no difference since no justiciable controversy was present and the act does not purport to alter the character of the controversies which are the subject of judicial power under the Constitution.

scholars to the conclusion that the court's caustic attitude could never be neutralized. Yet the court has now said that "changes merely in form or method of procedure by which federal rights are brought to final adjudication in the state courts are not enough to preclude review by this court." The *Wallace* case decision has laid the foundation for a more serviceable jurisprudence. To declare the Federal Act unconstitutional the Court would have to shut its eyes to the overwhelming weight of opinion of the state courts; to the recognition that the procedure has benefited the populace of foreign countries; to a procedure that discourages violence. It is unthinkable that the Supreme Court is prepared to construct an impassable barrier to the progress of preventive justice.

CASES UNDER THE FEDERAL ACT

Up to the time of writing there has been no case adjudicating upon the Federal Declaratory Judgment Act in any federal court other than the District Courts. Whereas none of the District Courts have seen fit to declare the act unconstitutional, and none have even seen fit to discuss this angle, it is considered important to review the manner in which this new procedure has been handled to see whether or not the federal courts will allow the declaratory actions to fulfill the fond hopes of its fervent advocates.

The first case to be brought under the Federal Declaratory Judgment Act was that of *Memphis Natural Gas Co. v. Gully.*[84] The suit was brought by a foreign corporation, claiming tax exemption under the state constitution, and seeking relief from financial peril of tax exactions by the collectors allegedly acting illegally. The defendant filed a motion to dismiss and it was overruled. The plaintiff was held to be entitled to declaratory relief under the new Act and the court held, further, that the mere prayer for declaratory relief was sufficient to necessitate the overruling the motion to dismiss.

The next case, in point of time was that of *Hary v. United Electric Coal Co.*[85] This was a suit brought by the employees of the defendant company to have declared their rights to bargain collectively under the privileges conferred by the N. I. R. A. The district court held that it was without jurisdiction to determine the rights conferred by the N. I. R. A. in a private suit. There is no ground on which to criticize this holding for the Declaratory Judgment Act was never intended to increase the jurisdiction of courts to subjects and matter which before the adoption of the Act did not come properly within their jurisdic-

[84] (1934) 8 F. Supp. 169.
[85] (1934) 8 F. Supp. 655.

tion. This same holding was the basis for the decisions denying declaratory decrees in the following cases: *Mississippi P. & L. Co. v. City of Jackson,*[86] *Automotive Equipment Inc. v. Trico Products Corp.*[87] and in *Lake Erie Provision Co. v. Moore.*[88] The decision in the *Hary* case did say, however, that where the court did have jurisdiction over the subject matter and matters of justiciability were present, the court would declare the jural relations even though the controversy had not ripened into a case requiring affirmative relief.

In *Black v. Little,*[89] an attempt was made to have declared the constitutionality of the A. A. A. as applied to the petitioner. The petitioner admitted that he was not entitled to relief by injunction, but alleged that since the District Attorney had power to insitute judicial proceedings to enforce the act there existed an "actual controversy" within the meaning of the Act. This contention was sustained by the court, which held that the very fact that the defendant contested the suit showed that a controversy did exist. This is a typical example where the court refuses to look behind the pleadings to decide whether there is a controversy existing.[90]

The decision in *Boggus Motor Co. v. Onderdonk*[91] can be encouraging only to the opponents of the new procedure. In that case the plaintiff, an auto dealer, was accused of violating the Code of Fair Competition for the Auto Industry,[92] by defendants who were district agents of the Recovery division. The accusers were withdrawn from this district by their superior officers and the plaintiffs had not been molested by the new officers. The court assumed that this procedure was evidence of the presumption by the superior officers that the plaintiff was not guilty of any violation that could be redressed in the courts. Whereas, the controversy as to plaintiff's violations were put to rest, the plaintiff insisted that a controversy as to the validity of the act still prevailed and in an amended petition asked for a declaration of the validity of the Code under the Declaratory Judgment Act. The court denied this request, holding that since plaintiff was no longer in danger of being prosecuted there was no case or controversy. Such a conclusion is a step backward. It is a re-

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[86] (1935) 9 F. Supp. 564.
[87] (1935) 10 F. Supp. 736.
[88] (1935) 11 F. Supp. 522.
[89] (1934) 8 F. Supp. 867.
[90] This practice should be contrasted with the practice of the Michigan court in the case of Anway v. Ry. (1920) 211 Mich. 592, 179 N. W. 350. See discussion by note 64, supra.
[91] (1935) 9 F. Supp. 950.
[92] Made under the authority of the N. I. R. A. 15 U. S. C. A. sec. 701 et seq.

turn to the reasoning of the *Liberty Warehouse* case[93] and a disregard of the holding of the *Wallace* case.[94]

The next case took a more acceptable view of the functions of a declaratory action.[95] This case was brought to restrain the collection of a tax imposed by the Tobacco Control Act and to secure declarations of unconstitutionality. The defense set up was that the act does not apply to cases arising under the revenue laws because there is another remedy available (the amendment of August 30, 1935 was not yet in force).[96] The court was explicit in declaring that the availability of another remedy does not prevent the maintenance of a suit for a declaratory judgment and therefore the court proceeded to declare the Tobacco Control Act invalid. The case was cited with approval in *Vogt & Sons v. Rothenseis*,[97] in which it was held that the plaintiff was entitled to a declaratory decree regarding certain taxing provisions of the A. A. A. The decision held the taxing provisions unconstitutional.

The policy of declaring Federal taxes unconstitutional under the declaratory procedure was apparently repugnant to the legislators who were rapidly seeking sources of income to meet the heavy governmental expenses. At any rate the Revenue Act of 1935, which was passed August 30th, prohibited the rendering of declaratory decrees by the federal courts on the validity of federal taxing statutes.[98] The inclusion of this limitation is one way to take the "teeth" out of the Declaratary Judgment Act which at the time was only one year in existence. It does not seem necessary to hold that this new limitation is an expression of policy by the Congress to the effect that it desires to limit the scope of declaratory actions, but rather that the limitation was prompted by a desire to prolong the decisions on the new tax acts, the revenue to be derived from which is so needed for the carrying on of the governmental activities.[98a] In *Henrietta Mills v. Hoey*[99] the amended provision was used as one of the reasons for the court's refusing to render a declaratory judgment on the constitutionality of some of the taxing provisions contained within the A. A. A. It is immaterial that the suit was brought before the date when the amended limitation was effected, for the amendment withdraws the declaratory relief as to suits then

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[93] Supra, note 73.
[94] Supra, note 81.
[95] Penn v. Glenn (1935) 10 F. Supp. 483.
[96] See this provision reported note 17, supra.
[97] (1935) 11 F. Supp. 225.
[98] Act of Aug. 30, 1935, c. 829 sec. 405.
[98a] 26 U. S. C. A. sec. 154. Adopted March 2, 1867. Now 26 U. S. C. A. sec. 1543.
[99] (1935) 12 F. Supp. 61.

pending as well as suits in the future.[100] The declaratory remedy being merely a statutory remedy there is no constitutional prohibition against the withdrawal of the relief, even as to suits already instituted.[100a]

Zenie Bros. v. Miskend[101] was an action by a garment manufacturer to obtain an injunction against unfair competition and to have declared void the defendant's patent on dress seams. The defendants were threatening plaintiff's customers with infringement suits and were thereby disrupting plaintiff's business. The court held the action maintainable under the Federal Declaratory Judgment Act. The case is an example of an action that but for the declaratory proceeding could not have been maintained. In an ordinary suit a private party, having no patent himself, cannot instigate a suit to have declared void a competitor's patent. Under the new procedure the court held that the suit was possible. Says the court, ". . . the act was passed with the purpose of affording relief in cases that couldn't be tried under existing forms of procedure. It is a remedial statute and should be liberally applied." The opinion was expressed that it does not necessarily follow that the plaintiff's only purpose was to obtain an advance ruling that they would have a good defense to an infringement suit, if the defendants would bring such an action. It is more tenable, the court felt, that the purpose was to obtain a determination so as to prevent harassment of their customers and to prevent further interruption with their business. This case is undoubtedly a blow to the opponents of declaratory actions, while it will provide another case upon which the proponents can rely to support their movement.

The *Automotive Equipment v. Trico Products Corp.* case referred to six paragraphs above was again brought into the courts;[102] this time in a district where the courts did have jurisdiction over the parties, thus correcting the defect of the first suit,

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[100] Note 17, supra. The writer desires to call the attention of the reader to the apparent error in the reporting of this amendment in the Supplement to the U. S. C. A., title 28, sec. 400, where it is erroneously stated that the limitation imposed does not apply to suits already pending. By express provision, the amendment applies to suits pending at that date. See case cited in note 99.

[100a] In Gebelein v. Milbourne (1935) 12 F. Supp. 105, an injunction restraining the collecting of the Hog processing tax was granted. The exhaustive opinion of Chesnut, J., recites that R. S. sec. 3224 (26 U. S. C. A. sec. 154) which provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained," was inapplicable where there exists highly exceptional circumstances, which in themselves are sufficient to bring the case within some acknowledged head of equity jurisprudence. Having granted the injunction on this basis the Declaratory Judgment Act amendment was held inapplicable.

[101] (1935) 10 F. Supp. 779.

[102] (1935) 11 F. Supp. 292.

In effect, the petition ask for a judgment declaring that petitioner's windshield wipers did not infringe upon the patents of the respondent. The court relied on the *Zenie Bros.* case in holding that bedause it was a patent involved was no reason to deny declaratory relief, but it refused to follow the case any further. It held directly contra to the *Zenie Bros.* case in holding that since there was another remedy available there was no reason to render a declaratory decree. The conclusion is arguable. The other remedy which the court refers to is not necessarily as efficacious: nor does it follow that the court is correct in declaring the plaintiff's purpose to be the establishment of a defense to an action brought by the respondent.[103] The judicial answer to the *Trico* case decision came within two months in the case of *Lionel Corp. v. De Fillippis.*[104] There too, the case was one involving a patent infringement; there too, there was a case pending in the trial court; but the court held that the petitioners could have a declaration as to whether the patents in question were being infringed on, since, according to this court's opinion, the issues in the infringement suit were not essentially the same as those in declaratory action.

The first case to be decided in the District Court of Missouri, was that of *Aetna Life Insurance Co. v. Haworth et al.*[105] This was an action by the insurance company against the insured and the beneficiary to have declared their liability on a lapsed policy. The defense filed a motion to dismiss and attacked the Declaratory Judgment Act as unconstitutional. In answer the court said, "The very language of the act destroys the argument . . . it was drawn with the constitutional limitations and the past Supreme Court decisions in mind. . . . It is limited to cases of actual controversy. Neither the mere designation of them as 'declaratory' judgments nor the fact that they embody a new method for the invocation of the judicial power invalidate them under the Constitution." The decision, however, was for the defendant on the merits, the court deciding that no present controversy existed, but merely a potential future controversy. The court refused to judicially predetermine an issue of fact that will be involved in a case that may be brought hereafter. As a practical matter, the plaintiff only desired to protect his defense when the litigation, if at all, would arise, so he might have accomplished the result by bringing a bill for the perpetuation of testimony, and thereby preserving the present testimony which he could use later.

Up to the time of this writing no cases on the Federal Act have

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[103] The Zenie Bros. v. Miskend case, note 101 supra, held that this purpose was not to be presumed.

[104] (1935) 11 F. Supp. 712.

[105] (1935) 11 F. Supp. 1016.

been adjudicated by any federal court, other than the District Courts. We must await patiently a decision from the Supreme Court.

MISSOURI CASES

There are as yet no reported decisions in Missouri on the validity of the Declaratory Judgment Act of this state. There is at present a suit filed under the act in the Circuit Court of St. Louis[106] which seeks to have the court declare the petitioner's rights and obligations under the beer ordinance. The case was originally set for the middle of October but has been continued.

There are but a few early Missouri cases that would, had there been a statute permitting declaratory actions then, have been decided under declaratory principles. The first was that of *State ex rel. Hahn v. Westport*[107] in which a realtor brought a mandamus proceeding against the city officials, to compel the issuance of new tax bills in place of old ones previously issued for a public improvement. The court denounced the proceeding as a sham, and as an attempt to have the court determine the validity of the old tax bills. The opinion was climaxed by the statement that "the legislature and not the judiciary promulgate laws for the future guidance of the people."

The next case of importance was that of *State ex rel. Schackleford v. McElhinnery*[108] where the petitioner was a licensed attorney and was duly elected to the office of probate judge in St. Louis. Subsequent to his election a statute was passed prohibiting a probate judge in counties over 50,000 persons from practicing law, and the act was supported by a penal sanction. The plaintiff became apprehensive that if he should continue to practice law he might be prosecuted, so he brought this mandamus proceeding to compel the respondent, a judge of the St. Louis Circuit Court, to permit him to practice law, nothwithstanding the statute which was attacked as invalid. The court in denying the writ held that it was a mere attempt to get a decision on the constitutionality of the statute. There is no question but that under the Declaratory Judgment Act such a factual situation would be properly adjudicated. In fact the similar circumstances were adjudicated in *State ex rel. Hopkins v. Grove.*[109]

In a recent case,[110] the court took jurisdiction over a suit for the re-instatement of a policy which the defendants had forfeited for non-payment, the court finding "valuable rights claimed by

[106] Division No. 3, Judge Baron, presiding judge.
[107] (1896) 135 Mo. 120, 36 S. W. 663.
[108] (1912) 241 Mo. 592, 145 S. W. 1139.
[109] Supra, note 66.
[110] Missouri Cattle Loan Co. v. Great Southern Life Ins. Co. (1932) 330 Mo. 988, 52 S. W. (2d) 1.

one party and denied by another." The leading United States Supreme Court Cases of *Gordon v. United States*[111] and *Willing v. Chicago Auditorium*[112] were distinguished. In the most recent case[113] the court recites that the judicial power is confined to controversies wherein something further than mere declarations of rights are sought. This view is really no longer tenable, but in fact, the expression of the court was mere dictum since all that was necessary to the decision was for the court to say that it no longer had jurisdiction over the subject matter.

SUMMARY

The declaratory judgment procedure has been employed in matters relating to the management and distribution of estates and trusts; construction and validity of wills, contracts, leases, insurance policies, bills of sale, mortgages, deeds of trust, and assignments; construction and validity of statutes and ordinances; to determine title to property; to declare the status of husband and wife, parent and child; to determine the legitimacy of a person, or his racial status; to declare the relative rights between trade associations and member firms; and to declare the rights of minors or children en *ventre sa mere*.[114]

One of the most useful purposes that the declaratory judgments will serve will be in the field of Administrative Law. This procedure will permit testing the powers of administrative agents, thereby preventing unwarranted conduct and resulting penalties. Administrative officers need only a declaration of their legal rights in order to be kept within the bounds of their legality.[115] This procedure may to some extent supersede the injunction which has been subjected to great abuse in the process of the determination of the validity of a law or order. In so far as it will restrain the use of the injunction it may help to set aside the hostile feeling now held by the populace against that form of relief against public laws.[116]

The real value of judgments declaratory of the rights of parties is that the proceeding for such a judgment is an expeditious and informal method of securing a binding judgment, which will be *res judicata*, without either of the parties being obliged to

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[111] Supra, note 21.
[112] Supra, note 76.
[113] State v. Witt (1934) 288 Mo. App. 432, 67 S. W. (2d) 817.
[114] For a collection of cases see annotations in 12 A. L. R. 76; 19 A. L. R. 1130; 68 A. L. R. 120; 87 A. L. R. 1223. Also Borchard, Judicial Relief for Peril and Insecurity (1932) 45 Harv. L. R. 793; Borchard, Judicial Relief for Insecurity (1933) 33 Col. L. R. 648.
[115] Borchard, Declaratory Judgments in Administrative Law. 11 N. Y. L. Q. Rev. 139.
[116] See 21 Va. L. Rev. 35, 49.

assume the responsibility of acting upon his own view of his rights,—a view which may subsequently be adjudged erroneous, with the result that he is characterized as a wrongdoer, and charged with the consequences that are ofttimes disasterous. It provides a simple, yet conclusive, method of serving the ends of justice before hostilities have ensued. It is a useful instrument of "preventive justice"[117] and the extent to which the relief has come into use under the statutes is sufficient to mark it as a well recognized instrumentality in the field of contemporary practice.

The declaratory judgment properly administered will fall within the bounds of "judicial power" in so far as it is a suit regularily instigated, and involving adverse parties who present to the court conflicting claims for adjudication. The steadfast rule that the scope of the judicial function is to correct rather than to declare is predicated upon the misconception that everyone knows what the law is, and further, that it is known just how a court will construe instruments such as wills, leases, contracts, etc. Such a restrictive use of the judicial power is in accord only with custom, and not with reason and logic.[118] If the law is to be a progressive science it must endeavor to fulfill a greater social need. The declaratory judgment is one method to accomplish this aim. And there is no constitutional restriction on the power to recognize the complexity of modern affairs, and to provide for the settlement of controversies between citizens without requiring violation of rights as a condition precedent to such adjudication.

The declaratory judgment has effected a revolution from the time when courts were only the "nemesis of wrongdoers." It represents the initiation of a procedure which will permit the courts to serve as a "diplomatic" rather than a "belligerent" agency.[119] Cardozo has said[120] that law "is the body of rules, principles, and tendencies which enables one to predict with reasonable certainty the judgments of the courts." The declaratory procedure will make predictions more easily verifiable . Clients will no longer have to gamble on the sagacity of counsel.

While the merits of the declaratory actions will be debated pro and con by the advocates and opponents of the procedure, the declaratory judgment will continue to serve as an instrument of preventive justice—inhibitory of injury. The reluctance of the states to adopt declaratory judgment acts in the '20's has

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[117] Borchard, Declaratory Judgments—A Needed Procedural Reform. 28 Yale L. J. 109 et seq.

[118] Bramon v. Babcock (1923) 98 Conn. 549, 120 Atl. 150.

[119] Sunderland, A Modern Evolution in Remedial Rights—The Declaratory Judgment, 16 Mich. L. Rev. 69.

[120] Cardozo, *Growth of the Law*, Chap. 2.

become a spontaneous desire to join the parade of states that have legislatively recognized its utility. The speedy acceptance which is now being afforded the declaratory judgment acts is indicative of its practical efficiency. Thirty-seven American jurisdictions have statutes permitting such judgments[121] and still the declaratory judgment marches on.

WALTER FREEDMAN '37.

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[121] Supra, notes 13 and 14.